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Supreme Court, U.S.
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No. 04-1126

In the Supreme Court of the United States

HOWARD MCDOUGALL, ET AL.,
Petitioners,

v.

C.C. MID WEST, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

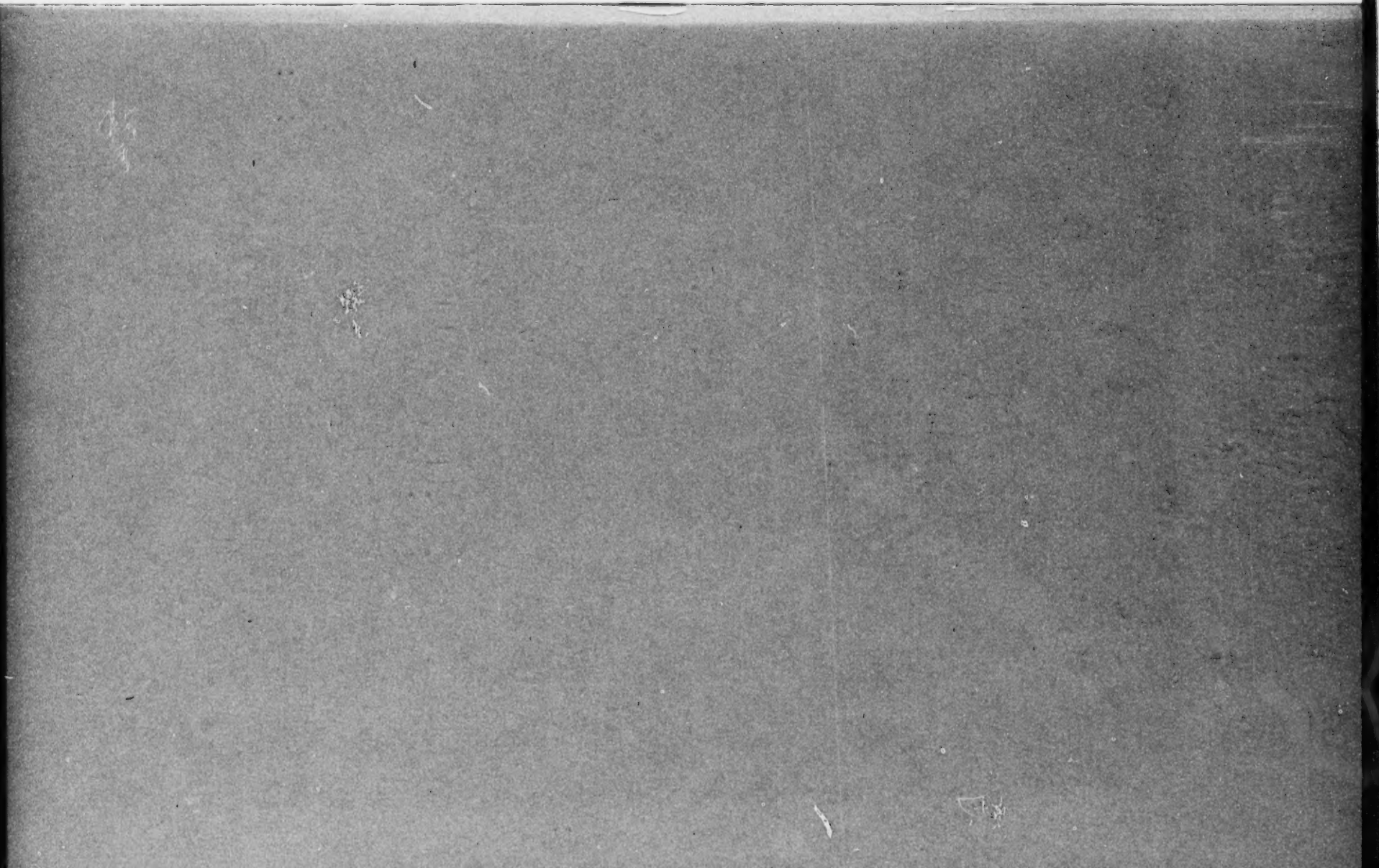
RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is an interlocutory order of the Michigan Supreme Court outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a), where it reinstates a summarily dismissed case and remands it to the State trial court for discovery and further proceedings, and thus is not a "[f]inal judgment or decree" of the Michigan Supreme Court?

2. Did the Michigan Supreme Court properly apply *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) in holding that Petitioners at this preliminary stage of the litigation have failed to show that ERISA preempts Michigan's common law of tortious interference with contract and business expectancies, as C.C. Mid West seeks to apply it?

LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., Joe Orrie, Jerry Younger, George J. Westley and Ray Cash are individuals who at all relevant times were employed either by trucking companies that competed with Respondent C.C. Mid West, Inc. ("C.C. Mid West") or by local affiliate unions of the International Brotherhood of Teamsters; each also was a trustee of the Central States, Southeast and Southwest Areas Pension Fund ("Fund"). Petitioner Estate of Robert J. Baker is the estate of the late Robert J. Baker, a deceased individual who at all relevant times was a trustee of the Fund. Petitioner Kubalanza was the Fund's administrator.

Respondent C.C. Mid West is a Michigan corporation.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

CenTra, Inc. is the parent of Central Transport International, Inc., which is the parent of C.C. Mid West, Inc. (now known as Central Transport, Inc). No publicly owned company owns 10 percent or more of the corporation's stock.

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OPINIONS BELOW

Respondent concurs with Petitioners' statement of Opinions Below, except that the June 17, 2004 Order of the Michigan Supreme Court of which Petitioners seek review is reported, at 683 N.W.2d 142 (Mich. 2004).

The November 22, 2004 Order denying reconsideration also is reported, at 688 N.W.2d 826 (Mich. 2004).

JURISDICTIONAL STATEMENT

The Michigan Supreme Court's June 17, 2004 Order is outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). As an interlocutory order that remands the case for discovery and further proceedings in the Michigan trial court, it is not a "final judgment or decree," and it does not fit within any of the four exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioners, Respondent references the following statutory provision in its Brief in Opposition:

28 U.S.C. § 1257(a) (2005):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty of statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question

on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised.

STATEMENT OF THE CASE

Respondent, C.C. Mid West, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Michigan Supreme Court's Order in this case, which is reported at 683 N.W.2d 142 (Mich. 2004).

C.C. Mid West is a Michigan-based trucking company, while Petitioners during the relevant period were the eight trustees and the administrator of the Central States, Southeast and Southwest Areas Pension Fund, a multi-employer pension fund commonly known as the "Teamsters' pension Fund" or "the Fund." Four of the Petitioners are former or current Teamster union officials, and four are former or current trucking industry executives affiliated with direct competitors of C.C. Mid West. C.C. Mid West has no involvement or connection with the Fund. (Complaint, Opposition, Apx.1b).

In March 1997, Central Transport, Inc., a separate transportation company that C.C. Mid West's corporate parent had sold to an unrelated party the preceding year, closed its doors and terminated approximately 235 truck drivers. (Complaint, Opposition, Apx. 1b; Excerpt of 3/28/97 General Release, Settlement and Termination Agreement (hereafter "Termination Agreement"), Opposition, Apx. 17b). Prior to going out of business, Central Transport had made pension contributions on the drivers' behalf to the Teamsters' pension Fund. After the drivers' termination,

Petitioners told them that they could self-pay into the Fund. This was of great value to the drivers, many of whom were within a few years of retirement, since it permitted them to safeguard their full pension benefits. (Complaint, Opposition, Apx. 1b). As it turned out, however, the representation that they could self-pay into the Fund was knowingly false.

As a trucking company C.C. Mid West depends heavily on owner-operator/independent contractors. In 1997 there was a severe nationwide shortage of qualified truck drivers, and C.C. Mid West began negotiating with the former Central Transport drivers in an effort to sign as many of them to contracts, on an owner-operator/independent contractor basis, as it could. C.C. Mid West entered into contracts with 59 of them and was actively negotiating with others, as well as with other owner-operators not formerly employed by Transport. (Complaint, Opposition, Apx. 1b). Upon learning of C.C. Mid West's efforts, however, Petitioners, in a deliberate effort to sabotage C.C. Mid West's business, repeatedly threatened the former Central Transport employees that they would not be allowed to self-contribute if they contracted with any company affiliated with C.C. Mid West's corporate parent, CenTra, Inc., including C.C. Mid West. (Ex. A to Complaint, Opposition, Apx. 15b). The threat was conveyed at least twice, via letter and in person at a meeting with many of the owner-operators held in Ft. Wayne, Indiana in early April 1997. It was disseminated not only to all 235 former Transport employees, but also to drivers throughout the trucking industry, and has never been retracted.

C.C. Mid West in August 1997 filed its Complaint, alleging tortious interference with contract and with business expectancies under Michigan common law. The Complaint alleged that Petitioners knew or reasonably should have known that their threats would intimidate many, if not all, of

the former Central Transport employees who had entered into contracts with C.C. Mid West into severing those ties, since C.C. Mid West is a CenTra affiliate, has no contractual connection to the Teamsters' pension Fund, and does not make pension contributions to it. Petitioners also knew or should reasonably have known that their threat would have a chilling effect on C.C. Mid West's negotiations with former Central Transport employees with whom it had not yet concluded agreements, and would deter other owner-operators throughout the industry from contracting with C.C. Mid West. (Complaint, Opposition, Apx. 1b). Anticipating that Petitioners would try to shield themselves from liability for their tortious conduct by hiding behind ERISA's general preemption provision, 29 U.S.C. § 1144(a), the Complaint explained that the threats had no lawful connection with any legitimate Fund administration, but rather constituted a malicious attempt by Petitioners to act upon their own personal animus against C.C. Mid West based on its non-union status, using as a weapon the illusory threat of disallowing self-payment. (Complaint, Opposition, Apx. 9b, 11b). Indeed, as C.C. Mid West later learned, at the time they issued the threats, Petitioners knew that the owner-operators would not be permitted to self-pay under any circumstances, as discussed below. The threat had its intended effects: Many owner-operators stopped driving for C.C. Mid West and took their trucks elsewhere, and the company has been seriously damaged as a direct result.

Consistent with its obligations under Supreme Court Rule 15.2, C.C. Mid West notes that the Petition for Writ of Certiorari contains numerous misstatements and mischaracterizations of fact. It repeatedly frames C.C. Mid West's allegations in ERISA terminology, asserting that C.C. Mid West "challenged the fiduciaries' 'refusal to accept self-contributions from owner-operators,'" (Petition, 5, citing

Complaint ¶ 30), and that "[t]he thrust of [C.C. Mid West]'s allegations is that the Defendant plan fiduciaries tortiously interfered...when the fiduciaries communicated their benefit determination that the layed [*sic*] off employees/plan participants would not be eligible under the plan to make pension self-contributions if they returned to active employment...." (Petition, 5). The "thrust" of the Complaint has nothing to do with a benefit-plan interpretation by fiduciaries or communication of it to plan participants. Rather it alleges, consistent with Michigan's common law of tortious interference, that Petitioners' actions were per se wrongful and/or done with malice and unjustified in the law, undertaken for the purpose of injuring C.C. Mid West as a trucking business. (Complaint, Opposition, Apx. 8b-12b). *See Mino v. Clio School Dist.*, 661 N.W.2d 586 (Mich. Ct. App.), *leave denied*, 669 N.W.2d 815 (Mich. 2003), *and reconsideration denied*, 677 N.W.2d 23 (Mich. 2004).

Elsewhere, Petitioners assert that "the pleadings themselves make clear that the basis of the claim is a benefit plan interpretation by plan fiduciaries and the communication of that interpretation to plan participants." (Petition, 9). But the Complaint does <u>not</u> challenge "fiduciaries' refusal to accept self-contributions," rather it challenges Petitioners' tortious attempt to drive owner-operators away from C.C. Mid West. (Complaint, Opposition, Apx. 1b).[1] To the extent (if any) that this case implicates issues relating to "benefit plan interpretation by plan fiduciaries and the communication of that interpretation to plan participants," it is solely because

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[1] Petitioners' reference to "the pleadings" (plural) is itself curious, since at the time the Michigan Supreme Court entered its Order in June 2004, they still had not filed an Answer to the 1997 Complaint. Eventually they answered in late 2004, after C.C. Mid West initiated proceedings to default them.

Petitioners have tried to inject those issues into the case in an attempt to evade liability via use of ERISA preemption.

Evidence that C.C. Mid West submitted below and which was central to the Michigan Supreme Court's Order – but about which the Petition is entirely silent – shows that Petitioners have invoked ERISA preemption improperly. C.C. Mid West in the trial court submitted the shutdown agreement that Central Transport had negotiated with the union representing its employees, demonstrating that the employees were terminated – not laid off – when that company closed. (Termination Agreement Excerpt, Opposition, Apx. 18b). C.C. Mid West also submitted sworn deposition testimony from the Fund's general counsel, given in another lawsuit, showing that Petitioners, at the time they were dangling the right to self-pay before the owner-operators in an effort to drive them away from C.C. Mid West, knew or should have known that the owner-operators would be unable, under <u>any</u> circumstances, to self-pay into the fund if they had been terminated (as opposed to laid off) by Central Transport. (Nyhan Dep., Opposition, Apx. 19b). This evidence exposes as pretextual and false Petitioners' claim that they were simply communicating about a "benefit determination," since there was no benefit determination to make: the drivers had been terminated by Central Transport, and thus could not self-pay.

After the Michigan Court of Appeals in 2002 affirmed summary disposition on an alternate basis not ruled on below, the Michigan Supreme Court vacated that ruling and remanded the case to the Court of Appeals with instructions to decide the ERISA preemption question. On remand, the Michigan Court of Appeals held that ERISA preempted C.C. Mid West's claims. The Michigan Supreme Court granted C.C. Mid West leave to appeal, and after full briefing and

argument, on June 17, 2004 entered its Order reinstating this case and remanding it to the Michigan trial court "for further development of the factual record through discovery or, if appropriate, for amendment of the pleadings." (Petition, Apx. 3a-4a).

Proceedings in the Michigan trial court since that time bear directly on the lack of this Court's certiorari jurisdiction, since they show that the Order is not a "final judgment or decree." C.C. Mid West has served written discovery that Petitioners have partially answered, and the trial court currently has pending before it C.C. Mid West's motion to compel discovery, which the parties as of this writing are attempting to resolve without further court intervention. Additionally, Petitioners on February 7, 2005, filed a renewed motion for summary disposition in the Michigan trial court, based on ERISA preemption. (Motion, Opposition, Apx. 31b). The motion is largely a repackaged version of their 1998 motion, and is accompanied by the affidavit of Thomas Nyhan, the Fund's general counsel in 1997 and its current administrator. Nyhan, who is not a defendant in this action, purports to relate the state of mind of each Petitioner during the events in question in 1997, i.e. that they were motivated not by tortious motives but rather by a wish to carry out their fiduciary duties under ERISA with regard to Fund administration. As of this writing Petitioners' renewed motion remains pending before the Michigan trial court; a hearing date has not been set.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Michigan Supreme Court's Order is an Interlocutory One That Remands the Case for Further Proceedings in the State Trial Court, and Thus Is Not a "Final Judgment or Decree" as Required By 28 U.S.C. § 1257(a).

This Court's certiorari jurisdiction over a decision of a State's highest court is governed by 28 U.S.C. § 1257(a), which states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.... [28 U.S.C. § 1257(a)].

The statute establishes a "firm" final-judgment rule:

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." [*Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997) (quoting *Market Street R. Co. v. R.R. Comm'n of California*, 324 U.S. 548, 551 (1945))].

The Order that Petitioners seek to have reviewed plainly is interlocutory, and in no way "final as an effective determination of the litigation." It vacates the grant of summary disposition (summary judgment) that had been entered by the Michigan trial court in 1998 and affirmed by the Michigan Court of Appeals, reinstates the case and remands it back to the Michigan trial court "for further development of the factual record through discovery or, if appropriate, for amendment of the pleadings." (Petition, Apx. 3a-4a). The Order notes that while Petitioners' claims "in the abstract" may be related to their duties as pension-fund trustees, "further factual development may show that they were not." (Petition, Apx. 4a). It relates the Michigan Supreme Court's belief that "further factual development will assist the [trial] court in this matter," and expressly remands the case for that factual development. (*Id*). Most important for these purposes, the Michigan Supreme Court expressly declined to endorse a particular definition of "relates to" for purposes of 29 U.S.C. § 1144(a), and specifically remanded the case to the trial court for discovery and development of various matters that "may be a threshold issue" bearing on whether or not ERISA preemption applies. (*Id*). As with the Alabama Supreme Court decision in *City of Tarrant*, which remanded the case back to the State trial court for further proceedings, the Order *sub judice* is "avowedly interlocutory," because "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims." 522 U.S. at 81; *see also O'Dell v. Espinoza*, 456 U.S. 430 (1982) (writ of certiorari dismissed for lack of jurisdiction since Colorado Supreme Court order remanded the case for trial, and thus was not final "as an effective determination of the litigation" nor within any exception to finality requirement); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 631-32 (1981) (California appellate court decision that remanded the

case to State trial court for resolution of factual disputes was not "final" judgment; appeal dismissed for lack of jurisdiction).

Indeed, under Petitioners' own theory the Michigan Supreme Court Order does not meet the first requirement of finality – that it "be subject to no further review or correction in any other state tribunal" – because, in their own view, it does not finally resolve the Federal issue in the Michigan courts. Petitioners' renewed motion for summary disposition, now pending in the State trial court, is premised on the assumption that the Michigan Supreme Court's Order has not finally decided the Federal question in this case: the motion is based on precisely the same ERISA preemption grounds Petitioners originally asserted in 1998. As the motion states:

> Under these circumstances, the application of state law urged by Plaintiff C.C. Mid West not only "relates to" an employee benefit plan – the minimum requirement for federal preemption under ERISA Section 514(a), 29 U.S.C. § 1144(a) – but actually *conflicts* with the obligations imposed by ERISA. There, it is clear that Plaintiff's claims are preempted by ERISA. (Motion, Opposition, Apx. 34b)(emphasis in original).

This Court in *Cox, supra,* recognized four exceptions to the finality rule, but none apply here because each requires the State-court ruling to have "finally decided" the Federal issue. 420 U.S. at 479-85. Petitioners can hardly assert to this Court that the Michigan Supreme Court's Order "finally decides" the ERISA preemption issue in this case, where they

are simultaneously litigating that very issue in the Michigan trial court.[2]

The finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." *City of Tarrant*, 522 U.S. at 81 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). Petitioners' failure to satisfy that rule, or any of its recognized exceptions, should result in denial of their Petition.

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[2] As their pending motion for summary disposition demonstrates, Petitioners plainly regard the Order as "subject to further review or correction" by the Michigan courts. That is one of the things that distinguishes this case from *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), an example of *Cox's* fourth category of finality exceptions. *See* STERN & GRESSMAN, SUPREME COURT PRACTICE, at 154 (8th ed. 2002). In *McClendon*, this Court granted certiorari to review a Texas Supreme Court ruling that ERISA did not preempt a State-law wrongful-discharge cause of action allowing plaintiff to recover if he could establish that "the principal reason for his termination" was his employer's desire to avoid contributing to, or paying benefits from, a pension fund. The Texas court's ruling was the last word on the Federal issue, since it ruled conclusively that ERISA did not preempt the claim, and no subsequent Texas court could possibly rule to the contrary. Here, however, Petitioners maintain that the Michigan Supreme Court's Order is *not* the final word on whether ERISA preempts C.C. Mid West's claims, even in the Michigan court system – as shown by their filing of a renewed motion for summary disposition based on ERISA preemption. (Motion, Opposition, Apx. 31b).

This Court previously has cautioned against an expansive reading of the fourth *Cox* exception, noting that application of it in the absence of a final judgment that adversely affects an important Federal interest "would permit the fourth exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981).

II. The Michigan Supreme Court's Order Is Fully Consistent With This Court's ERISA Preemption Jurisprudence and Reflects Uniformity Among the Federal Circuit Courts of Appeals, Not a Split.

Review on a writ of certiorari is not a matter of right but of judicial discretion, and will be granted only for compelling reasons. Supreme Court Rule 10. In addition to their failure to meet the statutory finality requirement, Petitioners present no "compelling reasons" for this Court to grant certiorari.

A. The Order Is Consistent With This Court's Current ERISA Preemption Jurisprudence.

Petitioners assert that the Michigan Supreme Court's Order conflicts with *Aetna Health, Inc. v. Davila*, __ U.S. __; 124 S. Ct. 2488 (2004), but it does not. *Aetna Health* involved "complete preemption" under ERISA § 502(a), 29 U.S.C. § 1132(a), for purposes of removal jurisdiction, and not defensive use of ERISA's general or "relate to" preemption provision, § 504(a), 29 U.S.C. § 1144(a), which this case involves. The inapplicability of "complete preemption" to this case was resolved in 1998, when Judge Rosen of the Eastern District of Michigan held that, because C.C. Mid West is an outsider to ERISA's regulatory framework and does not seek relief that could be recovered under ERISA, "complete preemption" did not provide Petitioners with removal jurisdiction. *C.C. Mid West v. McDougall*, 990 F. Supp. 914, 920-24 (E.D. Mich. 1998). Petitioners even conceded at oral argument before the Michigan Supreme Court in April 2004 that this case did not implicate "complete preemption" under § 502(a), and changed their theory only when *Aetna Health* came down four days after the Michigan Supreme Court issued its Order. But

Aetna Health has nothing to do with the issue this case presents.

In *Aetna Health*, ERISA plan participants brought claims against the administrators of their ERISA-governed benefit plans arising directly out of defendants' decisions not to provide coverage for treatment and services recommended by their doctors. Plaintiffs alleged that defendants' actions violated a Texas statute imposing a duty to exercise ordinary care in the handling of coverage decisions, but this Court had little difficulty in finding those State-law claims completely preempted by ERISA and thus removable to Federal court: Though couched in the language of State law, the claims were plainly for denial of coverage promised under terms of an ERISA-governed plan, and involved no violation of any legal duty independent of ERISA. *Aetna Health*, 124 S. Ct. at 2498 & n.4. As this Court noted, plaintiffs

> ...bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA. We hold that [plaintiffs'] state causes of action fall "within the scope of" ERISA § 502(a)(1)(B), *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987). [*Id.* at 2498].

Aetna Health sheds no light on the issue of preemption under ERISA § 514(a) as a defense to liability, and were it not for the temporal coincidence of it having been issued four days after the Michigan Supreme Court's Order, Petitioners doubtless would not even cite it. [3]

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[3] Petitioners attempt to rely on footnote 4 of *Aetna Health*, in which this Court noted that a State cause of action is preempted where it "provides an alternative remedy to those provided by the ERISA

The Michigan Supreme Court's Order in fact stands as a straightforward and faithful application of the ERISA § 514(a) preemption principles set forth in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988). In *Mackey*, this Court noted that "lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, *or even torts* committed by an ERISA plan – are relatively commonplace [and] although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a)" (emphasis added)(citations omitted). Significantly, that statement came even before the "sea change" in ERISA preemption jurisprudence ushered in 10 years ago by this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), and shows that even during the heyday of ERISA's preemptive sweep, this Court recognized Congress's intent to leave untouched claims brought by entities that are outside of ERISA's complex and reticulated enforcement structure.

The argument advanced by Petitioners in this case also could be offered in opposition to any of the "run-of-the-mill" claims listed in *Mackey* – i.e. that fiduciary duties owed to an ERISA plan and its participants required the breaking of a lease, the non-payment of a creditor, the commission of a tort, etc. But *Mackey* teaches that ERISA does not preempt such State-law claims. C.C. Mid West, an outsider to ERISA's regulatory framework, seeks money damages for harm that was inflicted on it by Petitioners, in violation of Michigan

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civil enforcement mechanism." But that founders on the indisputable fact that ERISA provides C.C. Mid West with no remedy whatsoever for the harm Petitioners have inflicted on it – as Judge Rosen correctly noted in 1998. *C.C. Mid West*, 990 F. Supp. at 920-24.

common law. This case involves simply the same sort of run-of-the-mill tort claim as in *Mackey*, and in fact is even less intrusive of ERISA's regulatory scheme than those discussed in *Mackey*, since it is not brought against the Fund itself.

The Petition for Writ of Certioriari is based on a subtle, yet critical, mischaracterization of the nature of this case. Petitioners repeatedly assert that C.C. Mid West's State-law tort claims require an interpretation of the ERISA-governed Fund and Petitioners' actions in administering it. *See, e.g.* Petition, p. 8 ("...resolution of *the claim* is dependent upon both the interpretation of the terms of the plan and the administration of the plan" (emphasis added); *Id.* at 9 ("...the pleadings themselves make clear that the basis *of the claim* is a benefit plan interpretation by plan fiduciaries....")(emphasis added). But C.C. Mid West's *claims* – that Petitioners set out to inflict economic damage upon it, based on each one's union-related or competitive animus toward C.C. Mid West and its corporate parent – have nothing to do with the Fund, and require no proof relating to the Fund in order for C.C. Mid West to prevail at trial. Rather, to the extent that issues of "plan interpretation," "communication of that interpretation to plan participants" and other such issues are present in the case, it is only because Petitioners have injected them as a defense to liability – as Judge Rosen noted more than seven years ago:

> ...Defendants argue the case should be removable to federal court because an analysis of the sufficiency of the complaint would require a court to determine whether Defendants' communications were required by or consistent with ERISA and thus 'justified.'

However, this argument is insufficient to invoked federal jurisdiction *because it is a defense....*" [*C.C. Mid West*, 990 F. Supp. at 924 (emphasis added)].

Petitioners are flatly incorrect in stating that C.C. Mid West's claim necessarily requires examination of plan terms. Their *defense* may implicate the Fund, but C.C. Mid West's claim does not. "The Court cannot allow Defendant to inject a federal question into Plaintiff's case to transform the action into one arising under federal law." *Id.*

Even with regard to claims brought by ERISA-governed entities – which is not this case, involving simple "run-of-the-mill state-law claims" brought by ERISA outsiders, of the type noted in *Mackey* – this Court's preemption analysis has undergone a sweeping constriction in the past decade. Beginning with its 1995 decision in *Travelers* this Court scaled back § 514(a) preemption dramatically, noting that the terms "relate to" and "connection with" are "unhelpful" in determining the limits of ERISA's preemptive powers. *Travelers*, 514 U.S. at 656. In fact, this Court has all but consigned its earlier attempts to construe the term "relate to" to the judicial scrap heap, noting unanimously in *Travelers* that

> ...[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for 'really, universally, relations stop nowhere'. . .we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here" [*Id.* (internal citation omitted)].

As Justice Scalia noted in concurrence in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316 (1997), "[t]he statutory text provides an illusory test, unless the Court is willing to decree a degree of pre-emption that no sensible person could have intended – which it is not." *Id.* at 335-36 (Scalia, J., concurring). Notably, all but a handful of the cases cited in the Petition predate this sea change.

Post-*Travelers*, proper ERISA preemption analysis, even where plaintiff is an ERISA-governed entity, begins with the recognition that § 514(a) is not intended to modify "the starting presumption that Congress does not intend to supplant state law." *Travelers*, 514 U.S. at 654-55; 115 S. Ct. at 1676 (citation omitted); *see also, DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813-14 (1997). Section 514(a) is not read to preempt all State-law claims that can simply be said to "relate to" an ERISA plan, which the Michigan Supreme Court's Order correctly recognized. (Petition, Apx. 4a). Under current analysis, a State-law claim brought by an ERISA-governed entity "relates to" an ERISA plan and is thus preempted only if it has "a connection with" or "reference to" the plan. *Travelers*, 514 U.S. at 656 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983); *Dillingham Constr.*, 519 U.S. at 324). Post-*Travelers*, § 514(a) has been construed to preempt in only two instances: where the State law in question either 1) mandates employee benefit structures or their administration, or 2) provides an "alternative enforcement mechanism" for ERISA benefits. *See Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 981-84 (9th Cir. 2001)(citing *Travelers* and other cases). Michigan's common law of tortious interference, as asserted by C.C. Mid West in this lawsuit, does neither.

Further, long before *Travelers*, this Court recognized that "where Congress legislates in a field which the States have traditionally occupied...we start with the assumption that the historic police powers of the States are not to be ousted by the Federal Act unless that was the *clear and manifest purpose* of Congress." *Dillingham Constr.*, 519 U.S. at 325 (citing *Travelers* and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added)). The party advocating preemption in such historically State-regulated areas bears a "considerable burden" in overcoming that presumption. *DeBuono*, 520 U.S. at 814 (citing *Travelers*, 514 U.S. at 654). It is beyond dispute that common-law tort liability is an area of traditional State regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (there is a "long tradition of state concern with the compensation of victims of negligently, recklessly, or intentionally inflicted injury"); *see also Coyne & Delany v. Selman*, 98 F.3d 1457, 1467 (4th Cir. 1996). The Michigan Supreme Court's Order, holding that Petitioners have failed to carry their burden at this point of the litigation, falls well within these settled boundaries.

Petitioners err when they complain that the Order "improperly imposes the burden of 'factual development' in a state court proceeding upon ERISA plans." (Petition, 9). The Order has imposed nothing upon any "ERISA plan" since no plan is a party to this action, and if there has been any imposition, it is due to Petitioners' own tactical choice in asserting an ERISA-preemption defense. Petitioners' evident view that they can immunize themselves from liability for any and all misconduct merely by claiming that the challenged action occurred in connection with their administration of the Fund, is simply not consistent with the current state of ERISA preemption case law.

B. The Order Creates No Conflict with Any Federal Circuit Court.

The Michigan Supreme Court's Order does not create a split with any Federal Circuit, and is entirely consistent with decisions from Circuits across the nation that have refused to preempt similar State common-law claims – in some instances, even when the plaintiff, unlike C.C. Mid West, was an ERISA entity. *See Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181 (4th Cir. 2002) (no preemption where plaintiff alleged "improper conduct so unrelated to the plan that it cannot be termed 'plan administration' of any sort"); *Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, __ F.3d __ (6th Cir. 2005) (State-law claims by employer against third-party record-keeper for ERISA-governed ESOP not preempted, where claims will not mandate a specific benefit structure, provide an alternate enforcement mechanism to ERISA or implicate relations among traditional ERISA entities); *Trustees of the AFTRA Health Fund v. Biondi*, 303 F.3d 765 (7th Cir. 2002) (common-law fraud claim brought against ERISA plan participant who fraudulently misrepresented marital status in order to collect benefits under plan was not preempted); *Dishman,* 269 F.3d at 984 (ERISA does not provide fiduciaries "with blanket immunity from garden variety torts which only peripherally impact daily plan administration"). Because there is no split between the Michigan Supreme Court and any of the Circuits, certiorari under Supreme Court Rule 10(b) is not warranted.

The clear trend among the Circuits is not to apply ERISA preemption against State-law claims where one of the parties is outside ERISA's regulatory framework. In *Dishman*, *supra*, a recipient of disability benefits from an ERISA-governed plan brought various ERISA claims against the Plan administrator, as well as a State-law invasion-of-privacy

claim, after his benefits were suspended following a private investigation that the administrator had ordered. The 9th Circuit found the State claim not preempted because California privacy law "by no stretch of the imagination" mandates certain employee benefit structures or their administration, and because holding plan administrators liable for the offensive conduct of their investigators "cannot be said to interfere with nationally uniform plan administration in the manner or to the extent" to warrant preemption. The court noted:

> The fact that the conduct at issue allegedly occurred "in the course of UNUM's administration of the plan" does not create a relationship sufficient to warrant preemption. If that were the case, a plan administrator could "investigate" a claim in all manner of tortious ways with impunity. What if one of UNUM's investigators had accidentally rear-ended Dishman's car while surveilling him? Would the fact that the surveillance was intended to shed light on his claim shield UNUM and the investigator from liability? What if UNUM had tapped Dishman's phone, put a tracer on his car, or trained a video camera into his bedroom in an effort to obtain information? Must that be tolerated simply because it is done purportedly in furtherance of plan administration? To ask the question is to answer it. Though there is clearly some relationship between the conduct alleged and the administration of the plan, it is not enough of a relationship to warrant preemption. We are certain that the objective of Congress in crafting Section 1144(a) was not to provide ERISA administrators with blanket immunity from garden variety torts which only peripherally impact daily plan administration. [*Dishman*, 269 F.3d at 984].

Dishman teaches that even where an ERISA administrator's misconduct arises directly from Plan administration, it may still be of a type that Congress simply did not intend to protect with blanket immunity from State common-law tort liability. This vitiates Petitioners' attempt to hide behind ERISA preemption by claiming that they were simply "communicating with plan participants" while administering their pension plan.

The Michigan Supreme Court's Order also is consistent with the Fourth Circuit's ruling in *Darcangelo*. In that case plaintiff brought various State-law tort and statutory claims, as well as breach of contract claims, against her employer, Verizon, and the administrator of its ERISA-governed disability plan, CORE. Plaintiff alleged that CORE improperly disseminated her private medical information to Verizon to help establish that she was a "direct threat" to her co-workers, so she could be fired without violating the Americans with Disabilities Act. *Darcangelo*, 292 F.3d at 187-88. CORE argued that the claims were preempted because they went to the heart of its ERISA fiduciary duties to handle medical and mental-health information obtained in its capacity as administrator of Verizon's employee welfare plans. *Id.* at 188. The district court agreed and found plaintiff's four common-law tort and statutory claims preempted by ERISA, but the 4th Circuit reversed, noting that post-*Travelers*, preemption is appropriate in only three basic categories of State law:

> (1) laws that mandate employee benefit structures or their administration, (2) laws that bind employers or plan administrators to particular choices or preclude uniform administrative practices, and (3) laws that provide an alternative enforcement mechanisms to ERISA's civil-enforcement provisions. [*Id.* at 190

(citing *Travelers*, 514 U.S. at 658-59; *Coyne & Delany, supra*, 98 F.3d at 1468)].

The court analyzed plaintiff's common-law and statutory claims under each: They were not based on State laws that "mandate employee benefit structures or their administration," since none dictate the terms of a plan or the type of benefits it may provide, or impose reporting, disclosure or funding requirements, or affect benefit calculations. *Id.*, citing *Coyne & Delany*, 98 F.3d at 1471. They were not based on any State law that would bind the plan administrator to a particular choice, because plaintiff "alleges conduct that is entirely outside the scope of plan administration [and] does not make any claim for relief that would regulate the structure or process of plan administration." *Id.* Finally, the common-law tort and statutory bases for plaintiff's action did not constitute alternative enforcement mechanisms for ERISA claims. *Id.* at 190-94.

The same analysis supports the Michigan Supreme Court's determination that Petitioners to date have failed to carry their heavy burden of showing that C.C. Mid West's claims are preempted. Michigan tortious-interference law neither dictates the terms of the Plan nor the benefits it may provide, nor does it impose reporting, disclosure or funding requirements. It does not bind Plan administrators to a particular choice: as in *Darcangelo*, C.C. Mid West's Complaint "alleges conduct that is entirely outside the scope of plan administration," i.e. advancement of defendants' personal interests at the expense of C.C. Mid West. Finally, with regard to the third category of preemption cases, it has already been settled that C.C. Mid West's claims are not disguised ERISA claims: C.C. Mid West is not an ERISA entity and cannot possibly bring an ERISA claim. *C.C. Mid West*, 990 F. Supp. at 920-21.

In *Penny/Ohlmann/Nieman, Inc., supra*, the Sixth Circuit adhered to the same view. Faced with State-law breach-of-contract and negligent misrepresentation claims brought by plaintiff, PONI, against both NCB – a bank that administered various of plaintiff's ERISA-governed plans – and MVP, a third-party record-keeper for one of the plans, the Sixth Circuit drew the same distinction as the other courts. While the claims against NCB were preempted since both PONI and NCB were ERISA entities, the State-law claims against MVP were *not* preempted, even where they related directly to MVP's conduct with regard to the ERISA-governed employee stock-ownership plan: MVP was not an ERISA entity, plaintiff's claims would not affect the structure, administration or benefits of the plan, and plaintiff neither asserted any rights under, nor attempted to enforce, plan terms. *Penny/Ohlmann/Nieman, Inc.*, __ F.3d at __.

In trying to show a Circuit split, Petitioners incorrectly portray *Garren v. John Hancock Mutual Life Insurance Co.*, 114 F.3d 186 (11th Cir. 1997) as holding that State-law claims "such as the claims raised by C.C. Mid West in this case" are preempted "precisely *because* they require an inquiry into benefit decisions and decisions and communications made by plan administrators." (Petition, 9-10) (emphasis in original). But the claims in *Garren* "clearly involved a traditional ERISA action – a refusal to pay benefits." *Commodities Specialists Co. v. Brummet*, No. 02-1459, 2002 U.S. Dist. Lexis 25399, at *15 & n.5 (D. Minn. 2002) (rejecting *Garren* as inapposite to issue of whether ERISA preempts action for employee's breach of non-compete agreement). C.C. Mid West does not seek Plan benefits, and as an outsider to ERISA's enforcement scheme in general, and Petitioners' Fund in particular, it cannot.

Petitioners' other case, *Mayeaux v. Louisiana Health Service & Indemnity Co.*, 376 F.3d 420 (5th Cir. 2004), is even less applicable. In *Mayeaux*, the 5th Circuit held preempted a doctor's common-law claims relating to an ERISA plan's denial of coverage for certain types of claims – causes of action clearly provided for in ERISA, and thus preempted by it. Had C.C. Mid West tried to stand in the shoes of the owner-operators who received Petitioners' threats and sue on their behalf, *Mayeaux* would provide a basis for preemption. In this case, though, it does not.

Far from presenting a split with any of the Federal circuit courts, the Michigan Supreme Court's Order is in accord with the overwhelming trend among the Circuits. Preemption does not apply where the claim at issue is brought by an ERISA outsider or does not seek relief available under ERISA – both of which are the case here. Certiorari under Supreme Court Rule 10(b) is not warranted.

CONCLUSION

The Michigan Supreme Court's June 17, 2004 Order is not a "[f]inal judgment or decree" of that court, and is outside this Court's certiorari jurisdiction under 28 U.S.C. § 1257(a). Even if that were not the case, the Petition for a Writ of Certiorari raises none of the "compelling reasons" for review by this Court set forth in Supreme Court Rule 10, and should be denied.

Respectfully submitted,

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APPENDIX 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

C.C. MID WEST, INC., a Michigan corporation, Plaintiff,	)
v.	)
HOWARD McDOUGALL, ROBERT J. BAKER, ARTHUR H. BUNTE, JR., R.V. PULLIAM, SR., JOE ORRIE, JERRY YOUNGER, GEORGE J. WESTLEY, RAY CASH, and RONALD J. KUBALANZA, individuals, jointly and severally, Defendants.	)

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COMPLAINT

There is no other civil action between these parties arising out of the same transaction or occurrence as alleged in this Complaint pending in this Court, nor has any such action been previously filed and dismissed or transferred after having been assigned to a judge.

/s/
Attorney of Record

Plaintiff C.C. MID WEST, INC. ("C.C. MID WEST"), through its attorneys, BUTZEL LONG, and DOMINA LAW, complains of Defendants as follows:

PARTIES

1. Plaintiff, C.C. MID WEST, INC., is a Michigan corporation with its principal place of business in Michigan.

2. The following Defendants are individuals, and reside in the locations specified:

Howard McDougall
Troy, Michigan

Joe Orrie
Bloomington, Minnesota

Robert J. Baker
Wheaton, Illinois

Jerry Younger
Omaha, Nebraska

Arthur H. Bunte, Jr.
Washington D.C.

George J. Westley
New Orleans, Louisiana

R. V. Pulliam, Sr.
Nashville, Tennessee

Ray Cash
Lake Placid, Florida

Howard J. Kubalanza
Rosemont, Illinois

3. Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley and Cash are Trustees of the Central States, Southeast and Southwest Regions Pension Fund ("the Pension Fund").

4. Defendant Kubalanza is the Executive Director of the Pension Fund, and at all relevant times acted as the agent and

representative of the other Defendants, with their authority and on their behalf.

5. The Defendants are being sued as individuals for the acts hereinafter alleged.

VENUE AND JURISDICTION

6. Venue is proper in Oakland County, Michigan, pursuant to MCL 600.1629 and 1621.

7. The amount in controversy exceeds $10,000 exclusive of interest and costs.

GENERAL ALLEGATIONS

8. Plaintiff C.C. MID WEST is a trucking operation and wholly-owned subsidiary of CenTra, Inc.

9. CenTra, Inc., formerly owned Central Transport, Inc. ("Transport"), a separate trucking operation that it sold in 1996.

10. At the time of Transport's sale, approximately 235 truck drivers who owned and operated their own trucking equipment were employed by Transport as employees ("the Transport owner-operators"), under terms of collective bargaining agreements between Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and their affiliated local unions (collectively, "the Teamsters").

11. Many of the Transport owner-operators live and/or operate their businesses in Michigan.

12. Sometime after Transport was sold, it initiated negotiations with the Teamsters over Transport's desire to cease operations and the effects thereof. Transport and the Teamsters negotiated and mutually agreed to a severance package that provided the Transport owner-operators with 60 days' notice of the shutdown, and severance payments totaling $4.6 million.

13. The Pension Fund is a multi-employer pension trust that provides pension benefits to individual Teamsters on whose behalf contributions to the Pension Fund are made, pursuant to collective bargaining agreements negotiated between various employers and the Teamsters.

14. Defendants McDougall, Baker, Bunte, Pulliam, Orrie, Younger, Westley and Cash oversee the Pension Fund. Defendant Kubalanza is responsible for conducting day-to-day operations of the Pension Fund.

15. At all relevant times, Defendant Kubalanza acted at the direction of, and/or with the knowledge, consent and/or authority of the other Defendants. Defendant Kubalanza's acts are imputed to the other Defendants, and all Defendants are jointly and severally liable for the acts and omissions herein alleged.

16. When Transport employed the owner-operators it made contributions to the Pension Fund on their behalf. Following the owner-operators' termination from employment by Transport, Defendants agreed to permit the owner-operators to make self-contributions into the Pension Fund for a period of up to five years.

17. Transport was a common carrier that utilized owner-operators as employees to move freight both interstate and

intrastate. Plaintiff C.C. MID WEST is a common carrier that utilizes the services of owner-operators as independent contractors to move freight both interstate and intrastate.

18. After Transport ceased operations, Plaintiff C.C. MID WEST contacted Transport owner-operators and offered to negotiate and ultimately enter into independent contractor agreements in which Plaintiff C.C. MID WEST would purchase from them their services.

19. Plaintiff C.C. MID WEST in fact concluded independent contractual agreements with 59 owner-operators formerly employed by Transport.

20. In an intentional and deliberate effort to deny Plaintiff C.C. MID WEST the services of any owner-operator, and with the intent thereby to injure Plaintiff C.C. MID WEST's business operations, Defendants threatened the former Transport owner-operators that any owner-operator who performed work for any company affiliated with CenTra, Inc. would be forbidden from making self-contributions to the Pension Fund.

21. The ability to make self-contributions to the Pension Fund, thereby ensuring pension income, is a thing of value to owner-operators.

22. All Defendants knew or reasonably should have known that Plaintiff C.C. MID WEST was affiliated with CenTra, Inc.

23. As an affiliate of CenTra, Inc., Plaintiff C.C. MID WEST was among the entities to which that threat related.

24. At a meeting held on or about April 4, 1997 in Ft. Wayne, Indiana, a representative of Defendants threatened the former Transport owner-operators that anyone who performed work for any company affiliated with CenTra, Inc. would be forbidden from making self-contributions to the Pension Fund.

25. In a letter dated May 7, 1997 sent to all former Transport owner-operators, the Defendants, by and through Defendant Kubalanza, repeated that threat. A copy of that letter is attached to this Complaint as **Exhibit A**, and is incorporated hereto by reference.

26. Defendants knew or reasonably should have known that the threats would be made known to the former Transport owner-operators.

27. All former Transport owner-operators have been made aware of the threats.

28. Defendants knew or reasonably should have known that the threats would be disseminated to and made known among owner-operators throughout the trucking industry, thereby increasing the level of injury to Plaintiff C.C. MID WEST.

29. Owner-operators throughout the trucking industry have been made aware of the threats.

30. To date no Defendant has retracted the threats, and the Trustee Defendants' refusal to accept self-contributions from owner-operators doing business with companies affiliated with CenTra, Inc., including Plaintiff C.C. MID WEST, is still in force.

COUNT I--TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS

31. Plaintiff incorporates and realleges all allegations set forth above.

32. Defendants at all relevant times knew or should reasonably have known of Plaintiff C.C. MID WEST's contractual agreements with former Transport owner-operators.

33. Defendants have a duty not to interfere, in a manner that is per se wrongful and/or done with malice and unjustified in the law, with any contractual agreement between Plaintiff C.C. MID WEST and any owner-operator.

34. In a deliberate and intentional effort to interfere with Plaintiff C.C. MID WEST's contractual relations with the former Transport owner-operators, Defendants authorized and/or conveyed to former Transport owner-operators the threats regarding non-acceptance of self-payments.

35. Defendants acted intentionally in authorizing and/or conveying those threats.

36. Defendants' actions were per se wrongful and/or done with malice and unjustified in the law, and constituted a breach of the duty owed by Defendants.

37. Defendants' actions were undertaken for the malicious and unjustified purpose of injuring Plaintiff C.C. MID WEST's ability to function as a trucking business.

38. As a direct and proximate result of Defendants' intentional actions, to date at least 12 of the 59 former Transport owner-

operators have terminated their contractual agreements with Plaintiff C.C. MID WEST.

39. Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund. Defendants have acted and continue to act with the motive and purpose of inflicting injury upon Plaintiff C.C. MID WEST by preventing it from entering into, effectuating and/or continuing contractual agreements with owner-operators, and have used the threat of terminating the owner-operators' right to contribute as the weapon with which to inflict this injury upon Plaintiff.

40. In authorizing and/or delivering their threat to the owner-operators, Defendants at all times acted in combination and via concerted action to accomplish their purpose by unlawful means.

41. Plaintiff C.C. MID WEST has sustained actual damages as a direct and proximate result of the Defendants' acts. Those damages include but are not necessarily limited to lost profits and injury to reputation.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

COUNT II--TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES

42. Plaintiff incorporates and realleges all allegations set forth above.

43. At all relevant times Plaintiff C.C. MID WEST has had sufficient work available to justify independent contractual agreements with at least 200 owner-operators.

44. Based on the business Plaintiff had available and the similarities between that business and the business performed by the former Transport owner-operators, Plaintiff C.C. MID WEST had a reasonable business expectancy of concluding contractual agreements with a minimum of 200 of the former Transport owner-operators.

45. As a direct and proximate result of the Defendants' threats, Plaintiff C.C. MID WEST has not been able to conclude independent contractual agreements with 200 of the former Transport owner-operators.

46. Based on the business Plaintiff had available and the similarities between that business and the business typically performed by owner-operators throughout the industry, Plaintiff C.C. MID WEST had a reasonable business expectancy of concluding contractual agreements with a minimum of 153 other owner-operators.

47. As a direct and proximate result of the Defendants' threats, Plaintiff C.C. MID WEST has been able to reach independent contractual agreements with only 28 other owner-operators.

48. Defendants at all relevant times have known or reasonably should have known of Plaintiff C.C. MID WEST's business expectancies relating to owner-operators.

49. Defendants have a duty not to interfere with business expectancies in a manner that is per se wrongful and/or done with malice and unjustified in the law.

50. In a deliberate and intentional effort to interfere with Plaintiff C.C. MID WEST's business expectancies with owner-operators, and prevent those expectancies from ripening into contractual agreements, Defendants have authorized and/or conveyed the threats described above.

51. Defendants acted intentionally in making and/or authorizing those threats.

52. Defendants' actions were per se wrongful and/or done with malice and unjustified in the law, and constituted a breach of the duty owed by Defendants.

53. Defendants' actions were undertaken for the malicious and unjustified purpose of injuring Plaintiff C.C. MID WEST's ability to function as a trucking business.

54. Some or all of the unknown number of owner-operators who have decided not to conclude contractual agreements with Plaintiff C.C. MID WEST have made that decision as a direct and proximate result of Defendants' intentional actions in authorizing and delivering the threats.

55. Defendants' wrongful conduct has no lawful connection with the purpose of the Pension Fund, and thus this action is not pre-empted by any provision of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Defendants have acted and continue to act with the unlawful motive and purpose of inflicting injury upon Plaintiff C.C. MID WEST and others by preventing Plaintiff C.C. MID WEST from entering into, effectuating and/or continuing viable business relationships with owner-operators, and have used the threat of terminating some owner-operators' right to contribute as the weapon with which to inflict this injury.

56. In authorizing and/or delivering their threats to the owner-operators, Defendants at all times acted in combination and via concerted action to accomplish their purpose by unlawful means.

57. Plaintiff C.C. MID WEST has sustained actual damages as a direct and proximate result of the Defendants' acts. Those acts have prevented Plaintiff from concluding contractual agreements with a) some or all of the 176 Transport owner-operators formerly employed by Transport who to date have not concluded such agreements, and b) an untold number of other owner-operators who hold themselves out as independent contractors elsewhere in the trucking industry who have decided not to subject themselves to the threats and coercion of Defendants, and have thus decided not to enter into contractual agreements with Plaintiff.

58. Plaintiff C.C. MID WEST's damages include but are not necessarily limited to lost profits and injury to reputation.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

COUNT III - EXEMPLARY DAMAGES

59. Plaintiff incorporates and realleges all allegations set forth above.

60. Defendants' actions in authorizing and/or making their threats to the owner-operators were done with malice and/or a reckless disregard for Plaintiff C.C. MID WEST's rights.

61. As a direct and proximate result of Defendants' actions, Plaintiff's reputation as a company with which owner-operators should want to enter into and/or continue contractual relationships has been injured.

62. Due to the difficulty of measuring such damages with precision, an award of compensatory damages will not make Plaintiff C.C. MID WEST whole, and thus exemplary damages are appropriate.

WHEREFORE, Plaintiff C.C. MID WEST demands judgment against all Defendants, jointly and severally, in an amount in excess of $10,000.00 that it is found to be entitled to, together with costs, interests and attorneys' fees, and any other relief that the Court deems just and equitable.

Respectfully submitted,

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Attorneys for C.C. MID WEST, INC.

Dated: August 25, 1997

EXHIBIT A TO COMPLAINT

**CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION FUNDS**

May 7, 1997

To Employees of Central Transport, Inc.

Re: The Closing of Central Transport, Inc.

Dear Participant:

We write to advise you that the Board of Trustees of the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds have agreed to accept the terms of the 1994-1998 collective bargaining agreement entered into between Central Transport, Inc. and TNFINC. As a result of this approval, we have adjusted our records to reflect an increase in this bargaining unit's pension benefits from Class 16 to Class 17B (the "Freight" plan), effective April 1, 1994. This means that any eligible participant who had worked under the terms of this contract would be eligible to have their benefits determined under Class 17B. **To determine how this will affect <u>your</u> benefit status, please call our Toll-Free number 1-800-323-5000, and speak to one of our representatives.**

The Trustees also agreed to permit those participants who are on lay-off status as a result of Central Transport, Inc.'s shut-down to continue to make pension self-payments for a period up to five (5) years provided that self-contributions will not be accepted for any period during which a participant

is performing work for any company affiliated with either U.S. Truck Company, Inc. or Centra, Inc.

As you may already know, Central States delayed accepting the 1994-1998 collective bargaining agreement because of our investigation into the causes of a steep reduction in the number of covered participants at Central Transport, Inc. and the company's refusal to add new-hires while apparently transferring covered work to non-union affiliates. To resolve this problem, Central States along with the IBT, attempted to convince Central Transport, Inc. to either restore their prior participation levels or to document that the work had not been transferred to non-union, non-participating companies. For over two (2) years, the company refused to comply with the Funds' request (even for information), and ultimately shut-down effective March 31, 1997.

Although this issue has not been resolved, the Trustees concluded that the participants should not be penalized for the actions of the company. Therefore the Trustees agreed to recognize the benefit improvements associated with the 1994-1998 collective bargaining agreement and have instructed the Central States' staff to pursue litigation with the company.

Very truly yours,

BOARD OF TRUSTEES

By:

/s/ _____
Ronald J. Kubalanza
Executive Director

RJK:mbh

APPENDIX 2

GENERAL RELEASE, SETTLEMENT AND TERMINATION AGREEMENT (Excerpt)

On this 28th day of March, 1997, CENTRAL TRANSPORT, INC. ("Central") and the TEAMSTERS NATIONAL FREIGHT INDUSTRY NEGOTIATING COMMITTEE ("TNFINC") affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS ("IBT") enter this General Release, Settlement and Termination Agreement (hereinafter "this Agreement").

A. RECITALS

1. Central will cease operations on or about March 29, 1997 ("Closure Date").

2. Central and TNFINC have engaged in good faith collective bargaining concerning Central's decision to cease operations and the impact of that decision upon bargaining unit owner/operators represented by TNFINC and various Local Unions affiliated with the IBT.

THEREFORE, in consideration of the foregoing and of the promises contained herein, it is hereby agreed as follows:

B. MUTUAL AGREEMENTS

1. The current collective bargaining agreement between the parties (NMFA and Addendum), scheduled by its terms to

expire March 31, 1998, shall remain in full force and effect until its expiration date solely for the purpose of enforcing the terms of this Agreement and for resolution of any pending monetary grievances filed prior to March 19, 1997 which do not challenge Central's right to cease operations.

2. Any inconsistencies or contradictions between this General Release, Settlement and Termination Agreement and the parties' collective bargaining agreement shall be governed by this Agreement.

3. On or before the Closure Date, owner/operators of Central will be terminated.

* * *

THIS AGREEMENT shall become effective upon signing by the parties hereto.

CENTRAL TRANSPORT, INC.

By: /s/ _____
Kirk Cummings, President

TEAMSTERS NATIONAL FREIGHT
INDUSTRY NEGOTIATING COMMITTEE
(on behalf of itself and all affiliated Local Unions)

By: /s/_____
Dennis C. Skelton, Co-Chairman

APPENDIX 3

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CASE NO. 97-C-3393

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, Trustee, and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND, and HOWARD McDOUGALL, Trustee, Plaintiffs,	)
v.	)
CENTRA, INC., a Delaware Corporation, and CENTRAL CARTAGE CO., a Michigan Corporation, Defendants.	)

EXCERPTS OF DEPOSITION OF THOMAS NYHAN

The deposition of THOMAS NYHAN, called by the CenTra, Inc. for examination, taken pursuant to the Federal Rules of Civil Procedure of the United States District Courts pertaining to the taking of depositions, taken before Lucia R. Block, a Notary Public within and for the County of Cook

and State of Illinois, and a Certified Shorthand Reporter of said State, taken at 55 East Monroe Street, 44th Floor, Chicago, Illinois, on the 13th day of January, 1998, at the hour of ^ TIME a.m.

APPEARANCES:
CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS
BY: MR. THOMAS W. HILL
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800.

On behalf of the Plaintiffs;

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
BY: MR. CHARLES C. JACKSON
MR. DAVID E. METZ
55 East Monroe Street Suite 4200
Chicago, Illinois 60603
(312) 346-8000,

on behalf of Defendant CenTra, Inc.;

DYKEMA GOSSETT
BY: MR. TIMOTHY K. CARROLL
400 Renaissance Center
35th Floor
Detroit, Michigan 48243
(313) 568-6835,

on behalf of Central Transport;

^ FIRM4

BY: ^ ATTORNEY4
^ Address4
^ Suite4
^ City4, ,^ State4 ^ Zip Code4
^ Phone,

on behalf of the ^ Party4.

ALSO PRESENT:
MR. KIRK O. CUMMINGS
MR. THOMAS CHRIST

INDEX **PAGE**

WITNESS
^ WITNESS NAME

Direct Examination by ^ Attorney
Cross Examination by ^ Attorney

EXHIBITS **PAGE REFERRED TO**

NUMBER
Defendants' Exhibit (Nyhan)

No. 1 (marked)
No. 2 (marked)
No. 3 (marked)
No. 4 (marked)
No. 5 (marked)
No. 6 (marked)
No. 7 (marked)
No. 8 (marked)
No. 9 (marked)
No. 10 (marked)

(witness sworn.)

THOMAS C. NYHAN,

called as a witness herein, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HILL:

Q. Can you state your name for the record?

A. Thomas C. Nyhan, N-Y-H-A-N.

Q. You are the general counsel of the Central States Pension Fund?

A. I am the general counsel of the Central States Southeast and Southwest Areas Pension Fund and the Central States Southeast and Southwest Areas Health and Welfare Fund.

Q. Do you have any other jobs?

A. No.

Q. How long have you been the general counsel?

A. I believe since October 15, 1988.

Q. Can you briefly summarize your duties as general counsel?

A. I provide legal advice to management at the Central States Health and Welfare and Pension Fund. I provide legal advice to the board of trustees, each board of trustees of the Central

States Health and Welfare and Pension Fund. I manage a law department consisting of various attorneys, secretaries, paralegals, and what have you. And I manage a case load, and that's about it.

Q. Have you ever been deposed before?

A. A few times, yes, sir.

Q. In cases involving pensior matters in connection with your duties at the Funds?

A. In cases -- Yes, cases involving my duties at the Fund and involving pension and other matters.

Q. Can you recall how many times?

A. No, I can't, not off the top of my head.

Q. Do you recall the names of the cases?

A. I can recall general subject matter, if that could help.

Q. Yes, whatever you remember.

A. We were involved in some litigation

* * *

[p. 163]

A. Yes.

Q. The third line, do you see where it says, "Transport shut down and laid off all its employees"?

A. Yes.

Q. Was there any discussion at the trustee meeting as to how to characterize what happened to the transport employees, whether they were laid off or just simply fired as a result of the company having shut down?

A. There was, to my recollection, no such discussion at that board meeting.

Q. Did you participate in any discussion at any time with Mr. McCall or with anyone as to whether the – what happened to the employees should be characterized as a layoff as opposed to something else?

A. Yes, I did.

Q. What was that conversation?

A. The conversation involved his negotiation of a shutdown agreement with the company. And at one time he advised me as to that there was a shutdown agreement that provided for the termination of all the employees and the payment of severance benefits to those employees.

Q. What was the nature of your discussion as to [p.164] whether to call to call it a layoff or something else?

A. At that time there was no further discussion with him, I just learned that information.

Q. All right. Was there subsequently or at any time --

A. I had certain conversations with various of the trustees of the Central States' Pension Fund subsequent to that

conversation with Mr. McCall and then had a later conversation with Mr. McCall.

Q. Tell me about the later conversation with Mr. McCall. I assume you won't my answer about the 12 trustees?

A. That's right.

Q. All right. Tell me about the later conversation with Mr. McCall.

A. I told Mr. McCall that as a matter of law that if that language was not modified Central States would be precluded from accepting self-payments or self-contributions from any of those terminated members.

Q. So you were saying it had to be changed from what to what?

A. That if the agreement did not preserve the employee status, their employee status, that we could [p.165] not, under applicable IRS regulations -- in my opinion we could not accept self-payments from those members, be them in Class 16, 17. This was not a question of whether or not we accepted the contract, it was just purely a question of under the self-payment rules of Fund whether or not they could be made if these guys were terminated.

Q. So it's preferable then to describe them as laid off employees?

A. I don't know if it's preferable or not preferable, but there's a legal distinction between calling them laid off or maintaining their employee status and terminating their participation for a number of different areas.

Q. What did Mr. McCall say about that?

A. I think he wanted to go back and discuss the issue with the company.

Q. Do you know how it was finally resolved with the company?

A. Yeah, I believe the agreement that was actually arrived at provided that the employees would maintain their employee status.

Q. Did Mr. McCall share drafts of the agreement with you?

[p.166]

A. He did. He sent a draft with me. I don't know if he shared many drafts, he sent a draft to me that included language regarding the continued employee status of the Central Transport drivers and asked if that language would pose a problem relative to the employees' ability to make self-contributions on a go-forward basis.

Q. And you told him it would not?

A. It would not.

Q. Did you have any additional conversations with Mr. McCall about the agreement?

A. Yeah. I did as a matter of fact. Yes.

Q. What was that conversation that you recall?

(Whereupon, a discussion was had between Mr. Carroll and the Mr. Cummings outside the hearing of counsel and the court reporter.).

THE WITNESS: I had learned that the company was -- can we have one deposition maybe in here guys? It's very distracting when I'm trying to testify.

After I learned that New Central Transport was going to take a "credit," I was concerned with the execution of the general release, I felt it was too

* * *

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MR. JACKSON: And you're instructing him not to answer?

MR. HILL: correct.

BY MR. JACKSON:

Q. Did Mr. Priede make -- did he report that he had made any representations about the affect of the settlement and termination agreement at this meeting?

MR. HILL: You're not allowed to answer that question for the same reason.

MR. JACKSON: About what he reported - if he said anything at the meeting?

MR. HILL: Absolutely.

MR. JACKSON: Okay. Same reasons?

MR. HILL: Yes.

BY MR. JACKSON:

Q. I'm going to show you what's been marked as Defendant's Exhibit No. 2. And do you see that this is a document entitled, "General Release Settlement and Termination Agreement"?

A. Yes, that's what it's entitled.

Q. And does Central States have a copy of this document in its files?

A. I believe we now have a copy of this in our files. When it was received, I don't know.

[p.184]

Q. Does Central States still have a copy of the draft document that was tendered to you by Mr. McCall?

A. Presumably, I do. In the ordinary course, it would be kept in our records. And as I sit here, I do not recall whether it was a partial or complete agreement that he sent.

Q. Did you at any time prior to litigation review this agreement?

A. I do not recall.

Q. Did you at any time prior to the April 30, 1997, board meeting review this agreement?

A. In April of 1997 I reviewed a portion of this agreement, focused at the time on the employee status issue.

Q. Let me ask you about that again. Is it correct that these employees were laid off?

MR. HILL: Object to the form.

THE WITNESS: You're going to have to ask our client.

MR. HILL: It calls for a legal conclusion.

THE WITNESS: I don't know the answer to the question.

BY MR. JACKSON:

Q. Take a look at paragraph 3. That reads, "On [p.185] or before the closure date, owner/operators of Central will be terminated"?

A. Uh-huh.

Q. Do you see that?

A. Yeah.

Q. If these are terminated - if the Central Transport employees were terminated rather than laid off, would that affect their eligibility for benefits?

A. Yes.

Q. Because under ERISA they would have to be – they would not any longer be -- have an employee status, correct?

A. It is my understanding, yes. This is the terminated agreement. There's another one I take it, is there not? I'm not sure I've seen this document at all, actually. I am familiar with a document that provided that the employees would retain their employee status and would be on layoff.

Q. I don't think we've been provided that, so we'll have to ask that we get it.

A. Really?

Q. Really.

MR. JACKSON: What's the next one.

(Whereupon Nyhan Deposition

* * * *

APPENDIX 4

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

Case No. 97-550272-NZ

C.C. MID WEST, INC.
a Michigan corporation,
Plaintiff,

HOWARD McDOUGALL, ROBERT J. BAKER,
ARTHUR H. BUNTE, JR.,
R.V. PULLIAM, SR., JOE ORRIE,
JERRY YOUNGER, GEORGE J. WESTLEY,
RAY CASH, and RONALD J. KUBALANZA,
individuals, jointly and severally,
Defendants.

DEFENDANTS' MOTIONS (1) FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(4) FOR LACK OF SUBJECT MATTER JURISDICTION AND (2) TO DISMISS, PURSUANT TO MCR 2.205, FOR FAILURE TO JOIN A NECESSARY PARTY

Stephen Wasinger (P-25963)
Stephen F. Wasinger PLC
100 Beacon Centre
26892 Woodward Avenue
Royal Oak, MI 48067
(248) 414-9942
Attorney for Defendants

Defendants, by their attorneys, move this Court for summary disposition pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction and (2) to dismiss, pursuant to MCR 2.205, for failure to join a necessary party:

1. Plaintiff C.C. Mid West, Inc. ("C.C. Mid West") sued eight Trustees and the Executive Director of the Central States, Southeast and Southwest Areas Pension Fund ("Pension Fund") alleging tortious interference with contractual relations and business expectancies. The Complaint alleges that the fiduciaries acted unlawfully when they told participants of the pension plan that they could lose their right to make pension self-contributions if they accepted re-employment, following a lay-off from Central Transport, Inc., with affiliates of CenTra, Inc. (C.C. Mid West is one such affiliate of CenTra, Inc.)

2. The Pension Fund is an "employee benefit plan" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3).

3. Defendants previously moved for dismissal of the Complaint pursuant to MCR 2.116(C)(4) -- lack of subject matter jurisdiction -- and MCR 2.116(C)(8)-- failure to state a claim upon which relied can be granted; and the court granted summary disposition finding that the state law claims were preempted by ERISA.

4. The Court of Appeals affirmed; but, on June 21, 2004, the Michigan Supreme Court ruled that further factual development "may" show that Defendants' statements about self-contribution were not "related" to the Trustees' pension fund duties. Specifically, the Supreme Court observed:

> For instance, it is not apparent from the pleadings, depositions, admissions, and documentary evidence whether the plan administrators had any duty to communicate information to the former employees because it is impossible to determine from the available information whether the former employees remained eligible to self-contribute at the time the challenged communications were made. This may be a threshold issue bearing on whether the fiduciaries' activities were protected under ERISA's preemption provisions. *See, e.g., Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825 (1988). We do not retain jurisdiction.

5. Defendants now move to dismiss, pursuant to MCR 2.116(C)(4), because the allegations of C.C. Mid West's Complaint, as well as the facts established by the Affidavit of Thomas Nyhan, Central States' Executive Director and General Counsel, demonstrate, as a matter of law, that the state law claims are preempted and, therefore, that this court lacks subject matter jurisdiction.

6. Specifically, Mr. Nyhan's affidavit demonstrates not only that the Plan Administrators had a duty to communicate information to the former employees, but also that the Plan Administrators communicated truthfully to the former employees based on the information then available to them. Further, as shown in Mr. Nyhan's affidavit, the Plan

Administrators in fact permitted the employees in question to make self-contributions. Nyhan Aff. (filed herewith), ¶ 4.

7. Under these circumstances, the application of state law urged by Plaintiff C.C. Mid West not only "relates to" an employee benefit plan -- the minimum requirement for federal preemption under ERISA Section 514(a), 29 U.S.C. § 1144(a) -- but actually *conflicts* with the obligations imposed by ERISA. Therefore, it is clear that Plaintiff's claims are preempted by ERISA.

8. Since jurisdiction is a preliminary matter which can be resolved by affidavit, there is no need for additional factual development beyond a review of the allegations of the Complaint as well as the facts stated, and documents attached to, Mr. Nyhan's affidavit.

9. In the alternative, Plaintiff's Complaint should be dismissed for failure to add a necessary party - the Pension Fund - as required under MCR 2.205. The Complaint alleges that the Defendants, as Trustees and administrators of the Pension Fund, committed acts *in the course of their trust administration* which injured Plaintiff C.C. Mid West. These allegations, if proven true, may establish that the trust itself (the Pension Fund) is liable for the conduct of the Defendants as trust administrators. As a result, the Fund is a necessary party to this action.

WHEREFORE, Defendants pray that this Court:

A. Enter an order dismissing C.C. Mid West's Complaint; and

B. Grant any other relief.

Respectfully submitted,

STEPHEN F. W[illegible]INGER, PLC
Attorneys for Defendants

/s/_____
Stephen Wasinger (P-25963)
100 Beacon Centre
26862 Woodward Avenue
Royal Oak, Michigan 48067
(248) 414-9900

Dated: February 7, 2005
KH070060